Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Application by BellSouth Corporation, BellSouth	)	
Telecommunications, Inc., and BellSouth Long	)	CC Docket No. 97-208
Distance, Inc. for Provision of In-region,	)	
InterLATA Services in South Carolina	)	

COMMENTS OF AT&T CORP. IN OPPOSITION TO BELLSOUTH'S SECTION 271 APPLICATION FOR SOUTH CAROLINA

Mark C. Rosenblum
Leonard J. Cali
Roy E. Hoffinger
Stephen C. Garavito

Its Attorneys

Vivian V. Furman
Karen E. Weis

AT&T Corp.
295 North Maple Avenue
Basking Ridge, NJ 07920
(908) 221-3539

David W. Carpenter
Mark E. Haddad
Ronald S. Flagg
Lawrence A. Miller
George W. Jones, Jr.
Richard E. Young

Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for AT&T Corp.

Kenneth P. McNeely
AT&T Corp.
1200 Peachtree Street, N.E.
Promenade I, Room 4036
Atlanta, GA 30309
(404) 810-8829

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AT&T Corp. ("AT&T") respectfully submits this opposition to the application of BellSouth Corp. et al. ("BellSouth") for authorization to provide interLATA services originating in South Carolina.

INTRODUCTION AND SUMMARY OF ARGUMENT

Relying on what it describes as the "exhaustive inquiry," "detailed factual findings," and "full evidentiary review" of the South Carolina Public Service Commission (SCPSC), BellSouth claims to have met "all relevant requirements under sections 251 and 252." BellSouth Br. ii. BellSouth thus attributes the lack of any substantial local competition to the "business decisions of potential competitors" who have "turn[ed] their backs" on South Carolina (id. at ii-iii), and claims that the way to create local competition in South Carolina is to authorize BellSouth to begin offering long distance service. Id. at iii.

These assertions are nonsense. The state commission's supposedly "in-depth analysis of BellSouth's checklist offerings" (Br. 3) is nothing more than a verbatim, commission-stamped recirculation of BellSouth's proposed order, with factual misstatements, legal errors, and even typos all intact. The state commission's action is particularly significant because it is the very state agency that new entrants otherwise would depend upon for assistance and support in

attempting to break BellSouth's local monopoly. The results of the Potemkin-proceedings below thus merit no deference because the South Carolina PSC exercised no independent judgment.

To the contrary, as demonstrated by the evidence discussed below and set forth in the affidavits and attachments accompanying these comments, BellSouth has pervasively failed to satisfy the checklist. BellSouth admits (Br. 20) that it has not complied with this Commission's requirements on such core issues as pricing, unbundled network elements, and operations support systems, and BellSouth has elsewhere improperly defined or defied its obligations under the Act and the Commission's implementing regulations. Accordingly, the reason that there is no significant competition in South Carolina today is BellSouth's actions, and the state commission's uncritical acquiescence in them.

Indeed, BellSouth has been thwarting the efforts of AT&T to create local competition since six months before the 1996 Act was passed. AT&T then responded to procompetitive state legislation in Georgia by attempting to begin negotiations with BellSouth regarding competitive local entry. AT&T expanded these efforts, after the federal Act was passed, to include negotiations for local entry by means of interconnection, unbundled network elements, and resale throughout BellSouth's region, including South Carolina. Yet in South Carolina and elsewhere, BellSouth has refused to make available item after item of the competitive checklist and has effectively blocked significant competitive entry whether by UNEs or by resale.

Foremost, BellSouth has blocked UNE competition by (1) failing to provide individual network elements in accord with the Act's requirements, (2) imposing exorbitant nonrecurring and recurring charges for the elements that are patently not cost-based, and (3) failing to comply with <u>any</u> version of its duties to allow new entrants to use combinations of UNEs.

For example, BellSouth failed to provide unbundled local switching in accord with the requirements of the Act and the Commission's rules. BellSouth has not come close to developing the capability within the local switching element to provide CLECs with the usage and billing data they will need to bill interexchange carriers for exchange access services and to bill for reciprocal compensation. The failure to meet this obligation (which applies regardless of whether the UNEs are combined by the CLEC or the incumbent) has itself effectively blocked UNE-based entry. Nor has BellSouth agreed to make individual vertical features available to new entrants except as they are currently packaged and sold at retail by BellSouth -- thereby denying new entrants yet another of the procompetitive advantages that unbundled switching is intended to provide.

Similarly, BellSouth has entirely failed to establish cost-based rates for the elements that it offers. It has imposed non-recurring charges that are supported by no cost studies and that have not been and could not be defended on any ground. Similarly, its recurring charges for UNEs have not been and cannot be demonstrated to be based on cost, and the attempts to defend these charges fail by their own terms. Beyond that, BellSouth has revised its SGAT[1] to force competitors to pay separate non-cost-based charges for vertical features in direct violation of the Act and the Commission's rules.

BellSouth has also taken no steps to allow new entrants to use combinations of UNEs. Although this rule was not stayed and thus was binding upon BellSouth while in effect, BellSouth simply ignored its duty to provide access to existing combinations of elements under the

[1] Statement of Generally Available Terms and Conditions for Interconnection, Unbundling and Resale Provided by BellSouth Telecommunications, Inc. in the State of South Carolina, Docket No. 97-101-C (Sep. 19, 1997) ("SGAT").

Commission rule (47 C.F.R. § 51.315(b)) that BellSouth challenged and that the Eighth Circuit held invalid on October 14, 1997. Meanwhile, during the period in which it was challenging this rule, BellSouth made no effort to comply with the very interpretations of § 251(c)(3) that it was urging. In particular, BellSouth never developed the interface specifications, methods and procedures, and other arrangements that CLECs will need in order to recombine BellSouth's UNEs as the Eighth Circuit's Order now requires. Even its SGAT speaks only to allowing CLECs to combine two elements -- the loop and port -- in collocated space, and is silent on any details of arrangements that would permit CLECs to combine all network elements directly without needing to "own or control some portion of a telecommunications network." Iowa Utilities Board v. FCC, 120 F.3d 753, 814 (8th Cir. 1997).

BellSouth has likewise frustrated efforts through resale. Even for this limited form of entry, BellSouth has succeeded in delaying or in some cases blocking altogether the access to BellSouth's services new entrants need successfully to compete, and BellSouth has not provided the OSS access required to offer resold service in even competitively trivial volumes. BellSouth remains unable to provide AT&T with the customized routing to AT&T's operator services and directory assistance centers that BellSouth's SGAT claims to offer and that AT&T has long sought. Worse still, since April, 1997, BellSouth has exploited AT&T's continued OS/DA dependence in its region by placing its own brand on all of the OS/DA services it resells to AT&T and other new entrants.

Resale-based entry is further stymied by BellSouth's failure to deploy electronic interfaces with even the capability to provide nondiscriminatory access to its OSS, let alone a demonstrated record of nondiscriminatory performance. Its South Carolina SGAT only promises that suitable

interfaces "will be" made operational in the future, and experience with BellSouth's existing interim interfaces has revealed major defects -- such as the collapse of BellSouth's Regional Street Address Guide ("RSAG") in response to modest increases in volumes of simple POTS orders -- that have undercut AT&T's ability to compete. To conceal from the Commission the magnitude of these and other problems, BellSouth has withheld performance data that demonstrates inadequate performance, misrepresented the data it has submitted in an attempt to define away problems, and invented a frivolous theory in which purported misclassification of the "rubric" under which evidence of nondiscriminatory performance is requested becomes grounds for not providing the information at all.

While the foregoing obstacles to resale are pervasive throughout BellSouth's region, BellSouth compounds them in South Carolina by having persuaded the SCPSC to adopt the very methodology for calculating an avoided-cost discount that this Commission expressly rejected in the Local Competition Order.[2] As a result, new entrants in South Carolina confront a 14.8 percent wholesale discount rate, the smallest in the region and one of the five smallest nationwide, a fact publicly applauded by the state commissioners but devastating to the prospects for successful resale competition. And in case the unlawful discount rate were not disincentive enough, BellSouth is rapidly locking the largest business customers and hundreds of millions of revenue-dollars into three and five-year contract service arrangements that BellSouth refuses to permit new entrants to resell either at a discount to existing customers or on any terms to new customers, in flat violation, once again, of clear Commission rules.

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[2] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, FCC 96-325 (rel. Aug. 8, 1996) ("Local Competition Order").

To grant BellSouth's application in these circumstances would thus reward BellSouth only for its extraordinary success in defying and delaying compliance with its legal obligations under the Act, and in obtaining its state commission's indifference to and blessing of that misconduct. Far from hastening the onset of local competition, granting BellSouth's application now would ensure that local competition would never materialize, for BellSouth would have no incentive to provide new entrants with the nondiscriminatory access to interconnection, unbundled network elements, and resale of BellSouth's services that they cannot get today. BellSouth would thus quickly become and long remain the only significant carrier able to offer the bundles of local and long-distance service that many customers prefer.

That is the very outcome Congress intended to prevent when it passed the Act. Congress recognized what common sense confirms: that the potential consumer welfare gains of adding one more competitor to an already-highly competitive long distance market are dwarfed by the potential gains of adding any new competitors to the long-monopolized local markets. BellSouth's determined refusal to accept its market-opening obligations confirms that Congress's goal will be achieved in South Carolina only if compliance with those obligations is a precondition of long distance authorization.

Part I of this brief sets forth in more detail the myriad ways in which BellSouth has failed to make available each of the items of the competitive checklist. In particular, this section sets forth BellSouth's failure:

> to make individual network elements available (for providing exchange access, and accessing vertical features and selective routing);
>
> to price unbundled network elements at cost;

to make combinations of network elements available, including combinations that entrants would themselves assemble directly from BellSouth's network;

to make nondiscriminatory access available to its OSS;

to price its wholesale services in accordance with the Act's requirements; and

to make its contract service arrangements available for resale without unlawful restrictions.

Each of these is independent grounds for denying BellSouth's application.

Although the Commission need not reach the issue, Part II explains that BellSouth has received qualifying requests sufficient to foreclose Track B, which is the only Track BellSouth invokes here. Part III shows that BellSouth not only operates today in violation of the nondiscrimination and separation requirements of section 272, but that it has deliberately refused to produce the information concerning affiliate transactions that this Commission has held is essential to any assessment of future compliance with section 272. Finally, Part IV explains why it would be contrary to the public interest to grant BellSouth's application before facilities-based competition is irreversibly established in its local markets -- a day that is likely farther off now than it was prior to the Eighth Circuit's recent decision to remove the BOCs' obligation to provide existing combinations of network elements.

I. BELLSOUTH HAS NOT MADE AVAILABLE EACH ITEM OF THE COMPETITIVE CHECKLIST

Section 271 requires proof that "all of the items included in the competitive checklist in subsection (c)(2)(B)" are "generally offered" to all potential CLECs pursuant to a Statement of Generally Available Terms and Conditions. § 271(d)(3)(A)(ii). BellSouth admits that it has not met this requirement. It concedes that it has crafted its SGAT to reflect not the Act or this

Commission's rules and requirements, but its own "interpretations of checklist requirements" for such items as "pricing, combinations of unbundled network elements, and certain OSS performance measurements and standards." BellSouth Br. 20. On this basis alone, its application must be denied.

Equally important, however, is BellSouth's failure actually to make available to requesting CLECs numerous checklist items that it nominally purports to offer on the face of its SGAT. The Georgia Commission recognized this point when it unanimously refused to approve a similar SGAT filed by BellSouth in that state because "BellSouth has not yet demonstrated that it is able to fulfill important aspects of the Statement's provisions on a nondiscriminatory basis that places CLECs at parity with BellSouth."[3] The Georgia Commission further made clear that "[t]he Statement should not be approved so long as BellSouth has not demonstrated that it is able to actually provision the services of interconnection, access to unbundled elements, and other items listed in the statement and required under Sections 251 and 252(d)."[4] Moreover, the Alabama Public Service Commission recently found the SGAT filed

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[3] See In re BellSouth Telecommunications Inc. Statement of Generally Available Terms and Conditions Under Section 252(f) of the Telecommunications Act of 1996, Docket No. 7253-U, pp. 7-8 (Georgia PSC Mar. 20, 1997).

[4] Id. at 8 (emphasis added); see also Memorandum from Dennis R. Sewell, et al. to All Commissioners, Georgia PSC Docket No. 7253-U, BellSouth's Statement of Generally Available Terms and Conditions Under Section 252(f) of the Telecommunications Act of 1996, p. 2 (Mar. 20, 1997) (Georgia Staff Recommendation) (because the "record shows that BellSouth is not yet able to fulfill important aspects of the Statement's provisions for interconnection and unbundled access to network elements on a nondiscriminatory basis," approval of the SGAT "would be misleading, by stating that BellSouth 'generally offers' items that are not actually available"); Wisconsin Utility Reg. Rep. (April 3, 1997).

by BellSouth in that state to be premature, because of its concern that BellSouth was not currently providing nondiscriminatory access to its OSS.[5]

Here, the record is overwhelming that BellSouth, despite repeated requests from AT&T, is unwilling and/or unable "to actually provision" unbundled switching, access to unbundled network elements, and access to OSS as required by the Act and this Commission's rules. It is equally clear that BellSouth has not yet made available either unbundled network elements or resold services at prices consistent with the Act's requirements. Each of these defects, set forth below and discussed in further detail in accompanying affidavits, is an independent reason to reject BellSouth's application. Cumulatively, they represent a powerful testament to BellSouth's willingness and ability to resist compliance with its duties under sections 251 and 252 of the Act.

A. BellSouth Has Not Made Available Unbundled Local Switching

BellSouth has not made available to CLECs reasonable and nondiscriminatory access to unbundled local switching. See § 271(c)(2)(B)(ii), (vi); 47 C.F.R. § 51.319(c). In particular, BellSouth is unable to provide CLECs with the usage and billing data they need to bill for access services or for reciprocal compensation. In addition, BellSouth is unlawfully pricing and restricting access to the vertical features of the switch. Finally, BellSouth remains unable to provide customized routing to AT&T's operator services and directory assistance centers, and further compounds this failure by refusing to unbrand the operator services and directory assistance that are purportedly available to AT&T.

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[5] In re Petition for Approval of a Statement of Generally Available Terms and Conditions Pursuant to §252(f) of the Telecommunications Act of 1996, Alabama PSC Docket No. 25835, p. 7 (October 16, 1997) ("Alabama PSC SGAT Order").

1. **Billing For Access Services:** The Act unequivocally imposes upon BellSouth the duty to provide AT&T with access to unbundled network elements "for the provision of a telecommunications service" such as exchange access. § 251(c)(3). The Commission's rules also establish that incumbent LECs must permit CLECs to use unbundled network elements to provide exchange access services. 47 C.F.R. §§ 51.307(c), 51.309(b). Of course, as the Commission has further recognized, an essential aspect of providing exchange access services is billing interexchange carriers for that service. See Local Competition Order ¶ 363 n.772 ("where new entrants purchase access to unbundled network elements to provide exchange access services . . . the new entrants may assess exchange access charges to IXCs originating or terminating toll calls on those elements."). And, in the face of BOC resistance, the Commission has twice reaffirmed these rules. See Order on Reconsideration ¶ 11 ("a carrier that purchases the unbundled local switching element . . . obtains the exclusive right to provide . . . exchange access . . . for that end user");[6] Third Order on Reconsideration ¶ 38 ("where a requesting carrier provides interstate exchange access services to customers, to whom it also provides local exchange service, the requesting carrier is entitled to assess originating and terminating access charges to interexchange carriers, and it is not obligated to pay access charges to the incumbent LEC").[7]

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[6] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket Nos. 96-98 et al., Order on Reconsideration, FCC 96-394 (rel. Sept. 27, 1996) ("Order on Reconsideration").

[7] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket Nos. 96-98 et al., Third Report and Order on Reconsideration and Further Notice of Proposed Rulemaking, FCC 97-295 (rel. Aug. 18, 1997) ("Third Order on Reconsideration").

Despite this clear obligation, BellSouth remains unwilling and unable for any calls to provide CLECs with the information they need to bill IXCs for exchange access services. To begin with, BellSouth categorically refuses to provide CLECs with the information they would need to bill IXCs for intrastate access charges. See Tamplin Aff. ¶ 10 (citing repeated BellSouth correspondence on this point). But nothing in the Act, the Commission's rules, or any judicial decision limits the exchange access services (or any telecommunications services) that new entrants can provide to purely interstate access. To the contrary, the Act broadly defines "telecommunications service" (which new entrants are entitled to UNEs to provide, see §§ 3(46), 251(c)(3)), and the Commission's rules and orders, cited above, are similarly all-encompassing.[8] There is certainly no jurisdictional basis for the distinction, because even BellSouth concedes that unbundled network elements may be used to provide purely local telephone exchange service. It simply makes no sense to say, as BellSouth has, that a new entrant is entitled to use unbundled network elements to provide purely local service and purely interstate access service, but not intrastate access.

BellSouth concedes that it has an obligation to provide appropriate billing and usage data to allow CLECs to bill IXCs for providing interstate access services. But that concession may be more apparent than real. BellSouth has long maintained -- and sought to enforce through its SGAT -- a rule that CLECs that use unbundled network elements to provide an end user with

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[8] The Commission's recent Texas Preemption Order assumed that new entrants using UNEs would be able to collect intrastate access charges. See In the matter of the Public Utility Commission of Texas, CCBPol 96-13, et seq., Memorandum Opinion and Order, FCC 97-346, ¶ 210 n.482 (rel. October 1, 1997) ("Texas Preemption Order") ("[T]he application of intrastate access charges to intrastate toll traffic carried over unbundled network elements would appear to raise significant issues under section 253 if the charges for unbundled network elements reflect unseparated costs.").

service that duplicates an existing BellSouth retail service will not be entitled to collect exchange access charges from IXCs who originate or terminate toll calls involving that customer. Tamplin Aff. ¶¶ 15-17. BellSouth has further maintained that "CLEC provisioning of purely ancillary functions or capabilities, such as operator services, Caller ID, Call Waiting, etc., in conjunction with combinations of BellSouth unbundled elements will not serve to distinguish a CLEC service from an existing BellSouth tariffed service." SGAT II.G.1 (as approved August 4, 1997). Given this broad definition, virtually any service that AT&T or any CLEC offered would be deemed by BellSouth to "duplicate" an existing BellSouth service, thereby eliminating, as a practical matter, any new entrant's ability to use unbundled network elements to provide exchange access services.[9]

Although BellSouth deleted the broad definition of services that "duplicate" an existing BellSouth service from its most recent SGAT, it has never disavowed either the definition or the principle behind it. To the contrary, in a letter to AT&T dated September 12, 1997, BellSouth once again stated its view that it will provide access billing information only "in instances where the use of unbundled network elements is not duplicating an existing BellSouth service." Letter from Mark Feidler (BellSouth) to William J. Carroll (AT&T) at 4 (Sept. 12, 1997), attached to Tamplin Aff. as Att. 1. Thus, the degree -- if any -- to which BellSouth will permit new entrants using unbundled network elements to collect access charges is uncertain.

Even assuming, however, that BellSouth is willing to provide CLECs with the necessary information, it is evident that BellSouth has not yet developed the capability to do so. BellSouth

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[9] Indeed, BellSouth has not denied that it considers any CLEC service provided using UNEs to "duplicate" BellSouth's service unless the CLEC uses either its own loop or its own switch. Tamplin Aff. ¶ 16.

admits as much in Mr. Feidler's letter of September 12. See id. at 4 ("BellSouth and AT&T need to work through industry fora to reach agreement on standards for record exchange and meet point billing."). Until the parties agree on these basic issues, and until BellSouth develops and deploys some appropriate arrangement to apportion switching usage data by carrier and by line for each CLEC, BellSouth will not be in a position legitimately to offer to provide the necessary access data. Tamplin Aff. ¶¶ 20-21.

BellSouth's contrary assertions are misleading. BellSouth's witness Mr. Milner vaguely asserts that "[a]s of August 14, 1997, BellSouth has a process in effect and the capability to mechanically produce a bill for usage charges if a CLEC purchases unbundled switching from BellSouth." Milner Aff. ¶ 52. As Mr. Feidler's September 12 letter more candidly admits, however, the only capability BellSouth may have achieved by August 14 is "the capability to bill the MOU based switching and transport elements for all local calls originating from [unbundled local switching line-ports]." Feidler letter to Carroll of Sept. 12 at 4. In short, BellSouth is even further behind than was Ameritech in developing the capability to provide access billing information. Cf. Ameritech Michigan Order ¶ 330.[10] Accordingly, BellSouth has failed to make unbundled switching available for use in providing exchange access services.

2. **Billing For Reciprocal Compensation:** BellSouth also has not developed the ability to provide new entrants with the billing and usage data needed to bill and collect reciprocal compensation from other carriers for terminating local calls (absent bill and keep

[10] In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, Memorandum Opinion and Order, FCC 97-298 (rel. Aug. 19, 1997) ("Ameritech Michigan Order").

arrangements). Historically, there was no need for BellSouth to capture such information on calls between end offices within its network, and BellSouth has neither asserted nor demonstrated that it has developed the ability to measure, record and process terminating usage data for local calls. Tamplin Aff. ¶¶ 25-26. In this way, too, it has failed to make the unbundled local switching fully available to new entrants.

3. **Restrictions On the Price and Use Of Vertical Features:** BellSouth further imposes unlawful restrictions on access to unbundled local switching both by refusing to provide vertical features as part of the unbundled local switch and by denying access to vertical features except as they are being used in existing BellSouth retail services. See Tamplin Aff. ¶¶ 27-38.

a. Over a year ago, in the Local Competition Order, the Commission rejected the arguments of BellSouth and other BOCs that vertical features should be classified exclusively as retail services. Local Competition Order, ¶ 413. Instead, the Commission concluded that "vertical switching features are part of the unbundled local switching element" that must be made available at cost-based prices (id.), that competitors must be able to make "an upfront purchase of all local switching features" (id. ¶ 423), and that states were free to consider whether CLECs should also be permitted to order vertical features as "separate network elements." Id. ¶ 414; see Local Competition Order On Reconsideration ¶ 11. The Eighth Circuit upheld these rules. Iowa Utilities Board, 120 F.3d at 808-810.

Despite the Commission's clear rejection of BellSouth's argument on vertical features, BellSouth presented the same argument to the South Carolina PSC, where it was uncritically accepted. Carroll Aff. ¶ 22. Indeed, even after the Eighth Circuit's decision, the South

Carolina PSC approved BellSouth's SGAT provision that expressly offered "'vertical features'" only "'at the retail service price less the applicable wholesale discount.'" Id. (quoting SGAT VI.A as approved August 4, 1997); see Tamplin Aff. ¶ 29.

Against this backdrop, it is plain that BellSouth's current SGAT is unlawful. Although the current version omits the statement that vertical features will be offered at retail rates, it replaces it with a statement that "[s]pecific vertical features . . . must be separately ordered" and that "rates for individual vertical features will be set by Order of the [SCPSC] in a separate docket." SGAT VI.B (emphasis added). Nowhere in the SGAT does BellSouth provide a cost-based price for the vertical features -- or even commit that the prices will be based on cost. And nowhere in the SGAT does BellSouth state that the price of the switch will be lowered to reflect the fact that vertical features will now be priced separately.

Thus, BellSouth's revised SGAT perpetuates, through different language, the defects in its prior SGAT. First, the SGAT fails to permit CLECs to buy vertical features as part of the unbundled switch, as the Commission's Orders require. Second, the SGAT fails to set or commit to cost-based separate prices for vertical features; given that the SCPSC previously approved pricing of vertical features at a price based on the retail rate, there is no reason to think it will not do so again. Finally, even if the South Carolina PSC did eventually price the vertical features at cost, the failure to set a switch price that backs out the cost of vertical features means that, under BellSouth's SGAT, CLECs at a minimum will be paying twice over for use of vertical features. Tamplin Aff. ¶¶ 30-34.

b. BellSouth has also proved unwilling to make all the features, functions, and capabilities of the switch available to purchasers of unbundled local switching.

On its face, BellSouth's SGAT purports to "offer all the functionality of its switches." SGAT VI.A. But in practice, BellSouth has limited that offer to features and functions as BellSouth currently provides them in its retail services.

This was confirmed when AT&T recently sent two preliminary test orders in Kentucky for customers to be served with unbundled network elements. One order sought to add a new service, "Call Hold." The other sought to add "900 number blocking." BellSouth refused to process these orders, explaining that neither service was available individually but had to be ordered as part of an existing BellSouth retail package of services. See Tamplin Aff. ¶¶ 36-38. BellSouth thus refuses to permit new entrants to activate and use the features inherent in the unbundled switch to offer services and options that differ from what BellSouth offers, thereby further undercutting the ability of new entrants to compete.

4. **Customized Routing:** BellSouth also has failed to make available yet another important switch capability -- customized routing. Local Competition Order ¶ 412. Customized routing to AT&T's OS/DA centers is particularly important to AT&T, because AT&T believes its OS/DA centers are a valuable asset that will play an important role in AT&T's effort to offer customers a superior service. Accordingly, since March, 1997, when AT&T began preparing for market entry in Georgia, AT&T has sought to have BellSouth route the operator and directory assistance calls of AT&T customers to AT&T's operator services and directory assistance centers. Tamplin Aff. ¶ 43.

BellSouth claims that customized routing is available today "using Line Class Codes." SGAT VI.A.2; BellSouth Varner Aff. ¶ 120.[11] But AT&T's experience demonstrates that this is not true. Even after more than five months of attempted implementation, AT&T's customers in Georgia still receive their OS/DA services via resale from BellSouth. In part, this is due to technical problems uncovered in field tests that AT&T expects will be resolved. Tamplin Aff. ¶ 43.

But it is also due to BellSouth's insistence that AT&T incur the substantial costs needed to specify the appropriate line class code on each Local Service Request form, even though that form already provides the class-of-service information that BellSouth needs to determine and implement the appropriate line class code, and even though BellSouth's customer representatives are not required to input line class codes. Id. ¶¶ 44-45. And if and when these technical issues are resolved, BellSouth has suggested that it may be able to convert no more than 100 existing AT&T resale customers to customized routing per business day -- thus guaranteeing that it would still take many months before BellSouth could actually make customized routing available to all of AT&T's eligible customers. Id. ¶ 46.

5. **Refusal to Unbrand:** BellSouth has exacerbated the anticompetitive effect of its inability to offer customized routing by insisting -- starting in April, 1997 -- on branding all of its OS/DA services, including that which it resells to new entrants such as AT&T. Thus, not only is AT&T unable to provide its customers the benefit of AT&T's OS/DA services, it

[11] BellSouth agrees that AT&T's preferred solution for customized routing, involving use of Advanced Intelligent Network (AIN) architecture, is technically feasible, but has admitted that an AIN solution for customized routing will not be available until the second or third quarter of 1998. Tamplin Aff. ¶ 52. Once again, the promise of future implementation is inadequate for demonstrating checklist compliance.

must accept that every time its customers need OS/DA they receive what amounts to an AT&T-subsidized commercial for BellSouth. As the Commission has recognized, this is anticompetitive. See Local Competition Order ¶ 971 ("[B]rand identification is critical to reseller attempts to compete with incumbent LECs and will minimize consumer confusion. Incumbent LECs are advantaged when reseller end-users are advised that the service is being provided by the reseller's primary competitor.").

On the face of BellSouth's SGAT, it would appear that such anticompetitive conduct is foreclosed. BellSouth claims to provide CLECs and their subscribers with "access to its unbranded directory assistance service" and with "selective routing" to "provide CLEC-branded operator call completion services." SGAT VII.B.2; VII.C.5. But as AT&T's experience with customized routing demonstrates, BellSouth is not currently able to provide selective routing, whether to AT&T's OS/DA centers or to BellSouth's centers (the latter being necessary for BellSouth to provide CLEC-branded service). Thus, notwithstanding the promises of its SGAT, BellSouth in reality offers CLECs no choice but to have their subscribers receive BellSouth-branded OS/DA.

BellSouth could and should solve this problem in an instant -- by simply disabling the branding of its services until such time as it truly is able to make selective routing available. Tamplin Aff. ¶ 61. This Commission has stated that "a providing LEC's failure to comply with the reasonable, technically feasible request of a competing provider for the providing LEC to rebrand . . . in the competing provider's name, or to remove the providing LEC's brand name, creates a presumption that the providing LEC is unlawfully restricting access . . . by competing providers" to OS/DA in violation of the section 251(b)(3) of the Act. Local Competition Second

Report and Order ¶¶ 128, 148;[12] see Local Competition Order ¶ 971. And last December the Georgia Commission specifically ordered BellSouth to "'revert to generic branding for all local exchange service providers, including itself'" in the event it could not provide branding for AT&T customers. Tamplin Aff. ¶ 56 (quoting Georgia arbitration order). BellSouth, however, is refusing to comply with the Georgia Commission's order. Id. ¶¶ 59-62. In these circumstances, BellSouth's refusal to suspend the branding of its service confirms the Commission's "presumption" that BellSouth is unlawfully refusing to provide nondiscriminatory access to OS/DA in violation of sections 251(b)(3) and 271(c)(2)(B)(xii).

B. BellSouth Has Not Made Available Combinations Of Unbundled Network Elements

AT&T's motion to dismiss sets forth BellSouth's refusal -- despite this Commission's unstayed regulations -- to offer competitors the opportunity to serve customers using combinations of unbundled network elements as they exist in BellSouth's network. See AT&T/LCI Motion to Dismiss at 1-2, 8-14; see also Crafton Aff. ¶¶ 9-18 (describing BellSouth's failure to work in good faith to attempt to provide AT&T with access to existing combinations). The Eighth Circuit, on reconsideration, has now vacated the rule that prohibited incumbents from insisting upon physically separating the individual elements of their networks. 47 C.F.R. § 51.315(b). That decision is irreconcilable with the plain language of the statute and fundamental principles of administrative law, as set forth below. But even accepting that decision on its terms, the Eighth Circuit's opinion leaves undisturbed the incumbents' statutory

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[12] In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98 et al., Second Report and Order, FCC 96-333 (August 8, 1996) ("Local Competition Second Report and Order").

obligation to permit new entrants to use "combinations" of their network elements to offer telecommunications services, and accordingly BellSouth's section 271 application cannot be approved unless and until BellSouth has made it possible for CLECs to do just that. BellSouth has yet to even to offer to comply with this obligation.

First, the plain language of section 251(c)(3) provides no basis for vacating the Commission's rules regarding existing combinations. The first sentence of section 251(c)(3) requires incumbent LECs to give new entrants "nondiscriminatory access to network elements" on "terms and conditions" that are "just, reasonable, and nondiscriminatory." § 251(c)(3). This sentence alone fully supports the Commission's rule prohibiting incumbent LECs from separating existing combinations of elements (47 C.F.R. § 51.315(b)), because such conduct is plainly discriminatory. Its sole purpose and effect would be to impose wholly unnecessary costs and delay upon new entrants that the incumbent LEC does not incur. See Crafton Aff. ¶¶ 13-14. The second sentence of section 251(c)(3), when read together with the first sentence, clearly imposes an additional duty upon incumbents to provide access to whatever combinations of elements entrants request, for it requires that LECs also provide access to combinations "in a manner that allows requesting carriers to combine" them to offer services.

The Commission's rule against separating network elements is further supported by the statute's requirement, also in the first sentence of section 251(c)(3), that access to network elements be provided "on an unbundled basis." § 251(c)(3). Although the Eighth Circuit understood the term "unbundled" to mean "physically separated," there is no basis for adopting that restrictive definition. To the contrary, to provide something on an unbundled basis is to state a separate price for it and to give users the option of declining to purchase it as part of a

package. This is not only the dictionary definition of the term,[13] but the meaning that the Commission has ascribed to it in numerous decisions over the past 20 years involving the unbundling of telephone sets from local service,[14] of inside wire,[15] of features used to provide enhanced services,[16] and of dedicated transport, switched transport, and tandem switching.[17] It is also the meaning that courts have ascribed to "unbundled" when used in other industries.[18] And it is fully consistent with Congress's decision to require not only the unbundling of network elements but of "services" as well (47 U.S.C. § 271(c)(2)(B)(iv)-(vi)) -- a decision which cannot be reconciled with the Eighth Circuit's "physically separated" definition. The Commission's

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[13] Random House Dictionary of the English Language, p. 2005 (2d Ed. Unab. 1981); accord, Webster's New Collegiate Dictionary (Merriam, 1981), p. 1263 ("unbundle" is "to give separate prices for equipment and supporting services; to price separately); American Herigate Dictionary, p. 1315 (2d Col. Ed. 1991) (unbundling is "[t]he separate pricing of goods and services"). That multiple dictionaries support the FCC's interpretation is itself conclusive of its reasonableness. See Nat'l R.R. Passenger Corp. v. Boston & Me. Corp., 503 U.S. 417, 418-19 (1992).

[14] Second Computer Inquiry, 77 F.C.C.2d 384, 388, 443-44 (1980), aff'd Computer and Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982).

[15] Inside Wiring, 59 Rad. Reg.2d 1143, 1151-53 (1986), aff'd, NARUC v. FCC, 880 F.2d 422 (D.C. Cir. 1989).

[16] Third Computer Inquiry, 104 F.C.C. 2d 958, 1064-66 (1986) ("unbundling means that "competitors will pay only for Basic Service Elements that they use").

[17] Expanded Interconnection, 7 FCC Rcd 7369 (1992) (dedicated transport); 8 FCC Rcd 7374 (1993) (switched transport and tandem switching).

[18] See, e.g., Northwest Pipeline Co. v. Federal Energy Regulatory Comm'n, 61 F.3d 1479, 1482 (10th Cir. 1995) (distinguishing "'bundled customers,'. . . who are charged a unitary rate," and "'unbundled customers,'...who are charged separately for each component of service"); Stinnett v. BellSouth, 1993 U.S. Dist. LEXIS 21056, *6 (E.D.Tenn. 1993) ("unbundling". . . means that "charges [are] listed separately on a customer's bill"); In re Data General Corp. Antitrust Litigation, 490 F. Supp. 1089, 1104 (N.D.Cal. 1980) ("[a]t least three companies that market both software and CPUs make their software available on an 'unbundled' basis, i.e., without also requiring the purchase of their own CPUs").

conclusion that provision of elements "on an unbundled basis" neither requires nor permits incumbents to insist on physical separation is -- if not required -- at the very least a permissible construction of the statute. Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 842-43 (1984).

Second, and in any event, BellSouth has not begun to take the steps it would need to make its individual network elements physically available to CLECs so that CLECs can take the steps necessary to combine them to offer services. All BellSouth has done is offer to provide collocated space for reconnecting loops and ports and to "negotiate" other arrangements. See SGAT II.F. BellSouth has made no effort to provide new entrants with the interface specifications, methods and procedures, and other arrangements that new entrants need to access on a separated basis each of BellSouth's network elements and combine those elements. Crafton Aff. ¶¶ 19-23.

Indeed, the limited opportunity that BellSouth provides for combining only two elements using a new entrant's equipment in collocated space is itself an unlawful restriction under the Eighth Circuit's decision. The Eighth Circuit squarely held that new entrants are not required to provide any of their own equipment in order to take advantage of their statutory right to combine the incumbent's network elements. Iowa Utilities Board, 120 F.3d at 814. Accordingly, BellSouth must provide CLECs not only the opportunity to combine elements using their own equipment in collocated space, but the direct "access to [BellSouth's] network" along with the necessary interface specifications, methods and procedures, and other arrangements, needed to enable CLECs to do the combining themselves. Iowa Utilities Board v. FCC, Order on Petitions for Rehearing at 2 (Oct. 14, 1997). As the Eighth Circuit has again confirmed, moreover, any purported concern an incumbent might raise about "competing carriers interfering